EXECUTIVE JUDGMENTS AND EXECUTIVE LEGISLATION.

THE questions, How far are the decisions of executive officers conclusive? and, To what extent and in what cases are such decisions reviewable by the courts? are under our system of government, of great importance, and problems involving their consideration are constantly presenting themselves for solution.

No one who has made any study of these questions can have failed to be impressed with the unsatisfactory character of the decisions of the courts relating thereto. The difficulty appears to be largely due to improvident attempts on the part of the courts to formulate in the cases actually before them a rule or rules which shall not only dispose of the case at bar in a satisfactory manner, but also serve as a guide for the disposal of future cases. These attempts have been so unsuccessful that one is surprised that they are still so lightly entered upon.

Ex-Secretary Olney has lately[1] directed attention to "the indeterminate and confusing" attitude of the United States Supreme Court on the point whether prescribing rates for railroads engaged in national commerce is a legislative function which cannot be delegated by Congress to a commission. The same characterization of the attitude of that court on the conclusiveness of executive decisions might with equal propriety be made.

For instance, in Miller *v.* Raum,[2] we find the rule stated,

"that the courts will not interfere with the executive officers of the government in the execution of their ordinary official duties even when those duties require an interpretation of the law, inasmuch as no appellate power is given them for this purpose."

In Oil Co. *v.* Hitchcock,[3] we find this statement:

"the Secretary, having the duty of seeing that the law is carried out, has jurisdiction to decide its meaning, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction."

---

[1] N. Am. Rev., Oct., 1905. [2] 135 U. S. 200. [3] 190 U. S. 316.

It would seem from these decisions that an attempt to overthrow a department ruling, however erroneous, as to the rights of parties under the laws, the execution of which had been entrusted to the department, was hopeless; and while this may be the result in practice, the court in the next case, Bates *v.* Paine,[1] though upholding the department's ruling, was unwilling to do so on the theory of its conclusiveness above stated, and promulgated a new rule, namely:

"That when the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, though they may have the power and will occasionally exercise the right of so doing."

It was necessary in Bates *v.* Paine to abandon the rule of the conclusiveness of the department's decision on matters of law formulated in the preceding cases, inasmuch as the particular decision which was before the court was a reversal of that which had governed the practice of the department on the same matter, and the rights of the parties dealing with it, during the preceding sixteen years. To have held both contradictory rulings conclusive was evidently a greater task than the court was willing to assume.

How long the rule in Bates *v.* Paine will remain unmodified is of course pure matter of conjecture. As regards questions of mixed law and fact, it would seem to be sufficiently vague to permit the court to interfere or not at its discretion, and is of course valueless in enabling one to determine when decisions of executive officers on such questions are subject to review by the courts. As regards questions of fact, the rule is explicit enough and may cause embarrassment in the future in the case of some peculiarly erroneous finding of fact; but the extent to which the Supreme Court of the United States is prepared to go in upholding legislation which makes the liberty of the citizen dependent on the decision of facts by an executive officer, from which decision there is no appeal to the court (which may be seen from the Ju Toy case),[2] is, to say the least, not indicative of an inclination to overthrow executive decisions of fact.

The Supreme Court of Massachusetts, too, has had its troubles in dealing with these perplexing questions, and as a recent decision

[1] 194 U. S. 104.

[2] 198 U. S. 253.

of that court[1] seems to have introduced a somewhat novel method of solving these difficulties, involving, too, a constitutional question which appears not to have received from the court the attention it merited, a short statement of that case and the rules enunciated by the opinion therein may be appropriate.

In order to appreciate the decision in Commonwealth *v.* Sisson, a brief review of some of the previous cases is necessary.

In Ela *v.* Smith,[2] for the purpose of deciding that the Mayor of Boston was not liable to an action for having unnecessarily issued an order calling out the military to prevent a mob or riot, his determination of the question whether such mob or riot was threatened was called *judicial*, the court holding that the statute clearly conferred on the mayor "a judicial power," and laying down this rule at p. 136:

> "Whenever the law vests in an officer or magistrate a right of judgment, and gives him a discretion to determine the facts on which that judgment is to be based, he necessarily exercises within the limits of his jurisdiction a judicial authority."

Here we have two things decided:

1. That an executive officer, the Mayor of Boston, may lawfully have judicial power conferred on him and may exercise judicial authority, and that while acting within the fair scope of this authority, he is clothed with all the rights and immunities which appertain to judicial tribunals.

2. That, while possessing all the immunities of judicial tribunals, he is subject to none of the limitations of those tribunals, but exercises his judicial functions without notice or hearing, and subject to no appeal.

The question whether the court properly construed the statute is beside the point. It may or it may not have been the intention of the legislature to confer on the mayor just such powers and immunities as the court found were conferred, nor need we now stop to question the power of the legislature to do this.

The point is simply that the court holds that judicial power may lawfully be conferred on an executive officer, and that, as the term "judicial power" is used in this case, it appears to be as a synonym for absolute or arbitrary power, — power the corrupt or negligent exercise of which subjects the holder to no liability,

---

[1] Commonwealth *v.* Sisson, 189 Mass. 247.

[2] 5 Gray (Mass.) 121.

and the correctness of whose exercise cannot be reviewed in any court.

It was however shortly perceived that the use of the term "judicial" as descriptive of a power of that character was somewhat inappropriate, and in a later case we find the term softened to "quasi-judicial." In Salem *v.* Eastern R. R. Co.[1] the court says:

"There are many cases in which powers of determination and action of a quasi-judicial character are given to officers entrusted with duties of local or municipal administration by which not only the property, but the lives of individuals, may be affected, and which from their nature must be exercised finally and conclusively without a hearing or even notice to the parties who may be affected."

And the case of Ela *v.* Smith is cited as an instance of the exercise of such a power.

It is not easy to perceive that the matter is much aided by the introduction of the qualifying word *quasi*. The final determination of a matter without notice to or hearing of those adversely affected by the judgment, and on evidence not under oath or even without any evidence, and on the tribunal's own motion has nothing judicial in its character.

The conclusion reached in Salem *v.* Eastern R. R., that the action of a local board of health in passing without notice an order for abatement of a particular nuisance was quasi-judicial, and that its finding that such a nuisance existed was conclusive for certain purposes, is reached by premising that it "stands upon similar ground" to general regulations prescribed by such boards, to whose validity "no previous notice to parties to be affected by them is necessary."

It would seem clear that in the opinion of the court the power under which such general regulations were passed was also quasi-judicial.

And this is expressly stated by the court in its opinion in the case of Belcher *v.* Farrar,[2] wherein it is stated that the power vested in boards of health to forbid by general regulations the exercise within their respective towns of any trade which is a nuisance, etc. "is in its nature quasi-judicial"; as

"its exercise necessarily involves the determination of the question whether a particular trade falls within the category contemplated by the legislature

[1] 98 Mass. 431, 443.

[2] 8 Allen (Mass.) 325.

in the enactment before cited, and requires the officers charged with the duty to use their discretion and judgment in adjudicating on the subject-matter. This is the decisive test that the authority vested in them is judicial and not ministerial merely."

Here we have the test carefully stated. It applies equally well to general and to special regulations, — to those which cover all cases of a certain class as well as to those which simply determine a particular case, — and its evident purpose is to distinguish from purely ministerial functions those wherein a discretion is vested in the executive official or board. If such a discretion exists, that is, if the executive official or board is charged with the duty of acting when a certain state of affairs exists, its power of determining whether or not that state of affairs exists is judicial or quasi-judicial, and, strangely enough, that determination is held to be conclusive, though made without notice or hearing and subject to no appeal.

In Nelson *v.* State Board of Health [1] a distinction is made between the two classes of regulations, the general and special, both of which are, by the decision in Belcher *v.* Farrar, placed on the same ground; and the first class, namely, the general regulations, are stated to be "quasi-legislative," while only as to those made regarding a particular case is the term "quasi-judicial" retained. To these latter only was it held that the appeal to the jury given by the act under consideration applied. This would seem, aside from the constitutional question to be later referred to, to be rather a felicitous distinction.

The use of the term "legislative" is adopted for the general measure applicable to all as a new rule of conduct, and as to which the arbitrary methods of legislative bodies, absence of notice, hearing, or appeal might be deemed suitable, while to the decision of the single case, with its notice, hearing, and right of appeal to a jury, the term "judicial" or "quasi-judicial" might well apply. It is simply to be noted, however, that this is a complete reversal of the meaning of the term "judicial" or "quasi-judicial" as used in the earlier cases. It then meant what the term "legislative" is now used to describe.

But let us accept the change as an improvement and see what have been its results.

In Commonwealth *v.* Sisson the statute provided that:

---

[1] 186 Mass. 330, 333.

"If the [Fish and Game] commissioners determine that the fish of any brook or stream in this commonwealth are of sufficient value to warrant the prohibition or regulation of the discharge therein of sawdust from saw mills, and that the discharge of sawdust from any particular saw mill materially injures such fish, they shall, by an order in writing to the owner or tenant of such saw mill, prohibit or regulate the discharge of sawdust therefrom into such brook or stream."

Under this authority the commissioners made an order reciting that they had determined that the fish in the Konkapot River were of sufficient value to warrant the prohibition of the discharge of sawdust into it, and that the discharge of sawdust from the defendants' mill into said brook materially injured the fish therein, and prohibited them from continuing such discharge. The defendants being prosecuted for failure to comply with the order, contended *inter alia* that the acts whereby the commissioners determined, (a) that the value of fish in any brook was sufficient to warrant prohibiting the discharge of sawdust therein, and (b) that the discharge of sawdust from any particular mill materially injured the fish in such brook, were judicial acts, and valid only when made under judicial forms, that is, prior notice, hearing and taking of sworn evidence, none of which forms had the commissioners complied with in this case.

The court did not dispute the defendants' contention that all this followed if the order was judicial, but in order to avoid those unpleasant consequences held that the commissioners' order, though a special one and one made to apply to the defendants only, was *legislative*, and hence valid without notice or hearing, as in legislative proceedings there is no right to either of these. This is not only emphasizing the complete reversal of the doctrine of Ela *v.* Smith and Salem *v.* Eastern R. R., where the terms "judicial" and "quasi-judicial" were employed to designate executive orders of this description, but is a decided extension of the meaning of the term "legislative" beyond that given by Nelson *v.* State Board of Health.

Another feature of the difficulty created by the opinion in the Sisson case is this. On p. 254 we find this rule:

". . . on the one hand, when the law is general and the question is whether under it the defendants are committing a nuisance, the facts are determined by judicial action. On the other hand, the determination of the same facts is legislative, in case the legislature decides to make the thing a nuisance *per se*. And when it is legislative, it is final, and no hearing is necessary."

Under this rule, if a board of health, under its general power to abate nuisances, had determined that a nuisance consisting of a pile of decaying fish existed on defendants' premises, and had made the decision without notice to or hearing the defendants, the lawfulness of the act of the board in abating this nuisance might be questioned in an action against it by the defendants. The contrary was determined in Salem *v.* Eastern R. R.

On the other hand, if the legislature determines to make the presence of a pile of decaying fish a nuisance, and the board finds that such a pile existed on defendants' land, he cannot dispute the correctness of the finding of the board, because it is legislative.

The contrary rule was laid down in Miller *v.* Horton,[1] where Holmes, J., in delivering the opinion of the court, says at p. 546:

"Within limits, it [the legislature] may thus enlarge or diminish the number of things to be deemed nuisances by the law, and courts cannot inquire why it includes certain property, and whether the motive was to avoid an investigation. But wherever it draws the line, an owner has the right to a hearing on the question whether his property falls within it, and this right is not destroyed by the fact that the line might have been drawn so differently as unquestionably to include that property. But if the property is admitted to fall within the line, there is nothing to try, provided the line drawn is a valid one under the police power."

Very likely the court in the Sisson case did not intend to lay down anything contrary to the rule in Miller *v.* Horton. There was nothing in the case to require the determination of any such point. The correctness of the findings of fact by the commissioners was not disputed, and the intent of the legislature to make those findings conclusive clearly appears. The case presented simply the question of the constitutional power of the legislature to enact such a law, and in view of the fact that the court was of the opinion that the act prohibited (the discharge of sawdust into the brook) was one which the defendants had no legal right to perform except so long as the legislature refrained from prohibiting it, that question would not appear to have been a difficult one.

The objection to the opinion is that in disposing of a comparatively simple case, it unnecessarily promulgates a novel rule on a

[1] 152 Mass. 540.

point of administrative law, and a rule open to grave constitutional objections which have apparently received no consideration from the court; and that it has introduced an element of serious uncertainty into a problem which the rules laid down in the cases of Miller *v.* Horton [1] and Stone *v.* Heath [2] had done much to render clear.

There remains to be noted the question of constitutional law above referred to. If the powers conferred on the Fish and Game Commissioners were either legislative or judicial, their exercise by an executive board would seem to be expressly prohibited by the Constitution of Massachusetts, Bill of Rights, Art. XXX.:

"In the government of this commonwealth . . . the executive [department] shall never exercise the legislative and judicial powers or either of them. . . to the end it may be a government of laws and not of men."

No mention is made in Commonwealth *v.* Sisson of this constitutional objection to vesting legislative powers in an executive board, unless it be the brief statement that "the right of the legislature to delegate some legislative functions to state boards was considered by this court in Brodbine *v.* Revere." [3]

This, of course, was not meant as a statement that the right of the legislature to delegate legislative power to the Fish and Game Commissioners was established by the decision in Brodbine *v.* Revere, and, in fact, the guarded expressions of that decision fall far short of establishing any such doctrine. The point decided in Brodbine *v.* Revere was that a regulation of the Board of Metropolitan Park Commissioners limiting the use of parkways was valid, but the court is extremely careful to refrain from deciding that the statute authorizing the park commissioners to make "rules and regulations for the government and use of the roadways or boulevards under its care" was a delegation of legislative power to that board, and to suggest [4] that the statute simply leaves to the board the administration of details which the legislature cannot well determine for itself.

Indeed the court suggests [5] that some of the statutes authorizing boards of health to make rules and regulations for the preservation of the public health, which it has been customary to regard as necessary exceptions to the rule above stated, and justified on the principle of local self-government may also be

---

[1] *Supra.* [2] 179 Mass. 385. [3] 182 Mass. 578.
[4] P. 602. [5] P. 601.

"justified constitutionally on the ground that the work of the board of health is only a determination of details in the nature of administration, which may be by a board appointed for that purpose, and that the substantive legislation is that part of the statute which prescribes a penalty for the disobedience of the rules which they make as agents performing executive and administrative duties."

In other words that the making of even general regulations under statutory authority is an executive and not a legislative function.

This principle, borrowed perhaps from the law of France, to which country we are also indebted for our theory of the separation of the powers of government, would seem to be well established in the jurisprudence of the federal courts interpreting the Constitution of the United States, and its adoption by that of Massachusetts, as suggested by the opinion in Brodbine *v.* Revere, would certainly tend to avoid needless conflict between legislation and the constitution.

Among the federal decisions see the case of *In re* Kollock,[1] where a regulation prescribing under the provisions of a revenue act the stamps, makes, and brands to be used on packages of oleomargarine, is said to have been made

"merely in the discharge of an administrative function, and falls within the numerous instances of regulations, needful to the operation of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer."

Even more closely in point, as showing that under the rule as laid down by the Supreme Court of the United States the acts of the Fish and Game Commissioners in the Sisson case were not the exercise of legislative power, are the cases of Field *v.* Clark[2] and Buttfield *v.* Stranahan.[3]

In Field *v.* Clark the question was whether an act of Congress permitting the free importation of certain articles, but providing that this privilege should be suspended as to any country producing such articles if the President deemed that such country imposed unreasonable exactions and duties on the products of the United States, was unconstitutional as delegating legislative power to the President.

The court, after laying down the principle that Congress cannot under the Constitution delegate legislative power to the President,

---

[1] 165 U. S. 526. [2] 143 U. S. 649. [3] 192 U. S. 470.

held that the act in question was not objectionable as attempting such delegation.

"Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law."[1]

And the language of the Supreme Court of Pennsylvania in Moers *v.* Reading[2] is quoted:

"Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law."

To the same effect is Buttfield *v.* Stranahan, where the law prohibited the importation of tea inferior in quality to the standards which should be fixed by the Secretary of the Treasury, and the court held that the conferring of that power on the Secretary to complete the law by determining the standards was not delegating legislative power to him.

And it is to be noted that the acts of the President and of the Secretary of the Treasury had this characteristic of legislative proceedings which was lacking in the acts of the commissioners in the Sisson case, namely, that they were acts of general application affecting all persons alike.

In fact nothing is gained and much is lost by applying the terms "legislative" and "judicial" to the act whereby an executive official or board determines that on the facts presented to or ascertained by him or by it, action should be taken for the enforcement of any law. Nor does the fact that the law may expressly leave such determination to the judgment of the official, as in the Sisson case, change the essential character of his act.

The disadvantage of such use of the term "legislative" as is made in the opinion in the Sisson case may be summarized as follows. If the term is correctly employed, and if the acts of the commissioners were really legislative, as the court seems to hold, the statute under which they acted apparently violated the express prohibition of the constitution of the state, unless it could be

---

[1] P. 693.

[2] 21 Pa. St. 188, 202.

shown to come within some recognized exception to the rule established by the constitution. One asks at once, Why was not the statute void? The opinion affords no answer to this query. The result is that a subject which calls for careful treatment has been needlessly confused.[1]

Edmund M. Parker.

BOSTON.

---

[1] Since the decision in Commonwealth *v.* Sisson an act (Chap. 356 of the Acts of 1906) has been passed — it is understood on the petition of the Messrs. Sisson — requiring the commissioners before making an order forbidding the discharge of sawdust into any stream to give notice thereof and a hearing thereon, and giving to any person aggrieved by such order a right of appeal to the Superior Court sitting in equity.

Since the passage of this act the functions of the commissioners in making such orders have probably ceased to be "legislative." *Quære,* have they become "judicial," now that such orders may only be made after notice and hearing?